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No. 109, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

NEW MEXICO'S REPLY TO TEXAS' AND OKLAHOMA'S EXCEPTIONS TO REPORT OF SPECIAL MASTER

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SUMMARY OF ARGUMENT

Oklahoma and Texas have filed separate exceptions to the Special Master's Report (October 15, 1990) ("Report"). Oklahoma takes exception to the Report's recommended ruling that the Canadian River Compact, 66 Stat. 74 (1952) ("Compact"), limits water in storage in New Mexico, not physical reservoir size or total capacity. Texas does not join Oklahoma's objection, abandoning the capacity issue, the principal issue of the lawsuit at the time of the original complaint. Oklahoma's arguments are erroneous and lead to impractical results. The Report correctly decided the issue.

Texas challenges the Report's recommendation that the issue concerning the Ute Reservoir desilting pool be remanded to the Canadian River Commission ("Commission") for further fact-finding and negotiation. Texas' exception is misplaced. The issue may be moot, and, if not, the Court will be assisted by the Commission's technical review of the desilting pool's sediment control functions, or by an evidentiary hearing before the Special Master. Such further proceedings will not harm Texas irreparably, if at all. If the Court decides the issue, New Mexico should prevail.

The parties agree regarding certain objections to the Report's procedural suggestions. Texas, however, requests sanctions against New Mexico. The Texas request for sanctions is improper and should be denied because Texas has conceded the capacity issue, and New Mexico was not reluctant to negotiate that issue.

ARGUMENT

I. The Report Correctly Recommends a Ruling that the Compact Does Not Limit Physical Size of New Mexico's Reservoirs. Oklahoma's Exception to the Recommended Ruling is Erroneous and Contradictory

Oklahoma excepts to the Report's recommended decision that the Compact limits only the amount of water in storage in New Mexico's reservoirs, not the total capacity of those reservoirs, even though Texas explicitly accepts that recommendation in its exception and does not join Oklahoma. *Compare* Exception of the State of Oklahoma (December 20, 1990) *with* Exceptions of the State of Texas (December 20, 1990). The chief flaw in Oklahoma's argument is Oklahoma's failure to acquaint the Court with what is really at stake in the capacity question. When the practical consequences of Oklahoma's position are examined, it becomes patent that the Compact negotiators could not have intended what Oklahoma hopes to force upon New Mexico.

Oklahoma starts from the premise that the Compact's purpose was to limit storage of water in New Mexico, and observes that "either limitation mechanism, *capacity or waters-in-storage*, would achieve the Compact's purpose[s]." Oklahoma Brief at 8 (December 20, 1990) ("Ok. Br.") (emphasis in original). In fact, however, it matters dramatically whether the Compact is interpreted to limit total reservoir capacity or simply waters in storage.

The real purposes of the Compact, as Oklahoma concedes, are to "protect present developments within the [signatory] States" and to "provide for the construction of additional works." Compact Art. I; Ok.

Br. at 8. A limit on total reservoir capacity in New Mexico would directly contradict these purposes, even if an exception is made for dead storage.[1] If the Compact is misread to limit reservoir capacity in New Mexico, New Mexico's Compact allocation will be continually decreased due to constant sediment deposition in Ute Reservoir, and the amount of water available to New Mexico for release from conservation storage will be reduced. It is contrary to the explicit purposes of the Compact to deprive New Mexico of the conservation storage right expressly given to it by the Compact.

Oklahoma has never successfully answered this contradiction. *See* Tr. at 56-71, 177-78 (November 1, 1989) (exchanges between Special Master and Oklahoma Counsel of Record, where Master pressed Oklahoma on the sediment issue). Even if Oklahoma were to suggest that New Mexico could build replacement storage as silt fills its reservoirs, New Mexico's Compact allotment would be reduced. New reservoirs would regularly have to be built, or existing ones enlarged, at enormous cost to New Mexico. This would effectively reduce New Mexico's Compact share in relatively short order. This cannot be what was envisioned under the Compact. The Compact gives New Mexico the right to have 200,000 acre-feet of conservation storage for water originating below Conchas Dam. Dams must be constructed to provide sufficient capacity for sediment deposition in addition to adequate conservation storage. Oklahoma, however, does not consider the need to construct reservoir capacity for

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[1] Oklahoma apparently does not claim that total reservoir capacity includes dead storage at Ute Reservoir. *See* Tr. at 57-59 (November 1, 1989).

sediment deposition.[2] Oklahoma's interpretation of the Compact, which deprives New Mexico of its Compact right as a practical matter, cannot be correct.

Oklahoma's legal arguments are likewise erroneous. Oklahoma is incorrect that a "plain reading" of Articles IV(b) and II(d) of the Compact supports a limitation on the physical capacity of New Mexico reservoirs. Ok. Br. at 6. Article IV(b) does not use the word "capacity" at all; therefore, Oklahoma must be relying on the phrase "portion of the capacity of reservoirs available for the storage of water" in Article II(d) to support its "plain reading" claim.[3] To the contrary, that phrase does not suggest a limitation on the size of a reservoir. What it contemplates is that a reservoir may have different "portion[s] of the capacity" available for storage of water allocated to different purposes. What Oklahoma attempts to do, however, is to take the word "capacity" out of con-

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[2] Oklahoma says that there is "not less than" 245,000 acre-feet of capacity located below Conchas Dam, citing the Report's remark that there is "about" that much physical capacity below Conchas. Ok. Br. at 15; Report at 36. Based on the 1983 capacity survey of Ute Reservoir, there is 242,500 acre-feet of capacity located below Conchas Dam, excluding dead storage but not excluding accumulated sediment in reservoirs other than Ute. If such sediment were deducted, the figure would be lower. *See* Agreed Material Facts E10, E21, F3.

[3] Article II(d) of the Compact says:

> "The term 'conservation storage' means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them."

text, treating the phrase as if the words "that portion of" did not exist. There is no reason to ignore this Compact language. In fact, Article II(d) directly contradicts Oklahoma's position, because it allows for "portion[s] of" capacity to be devoted to exempt purposes, such as sediment control. Thus the Compact recognizes that reservoirs will be built that are larger than conservation storage limitations.[4]

Oklahoma implicitly admits that the Compact allows construction of excess reservoir capacity for flood control, power production and sediment control. Ok. Br. at 10 ("capacities allocated solely to flood control or power production could be used to temporarily store [other] waters"). Oklahoma makes this implicit admission in discussing Article VII of the Compact, which permits New Mexico, with Commission approval, to store water in excess of its Article IV limitations.[5] Oklahoma fails to recognize, however, that this admission destroys the logic of its position on the capacity issue. If New Mexico's reservoir capacity is limited to 200,000 acre-feet, then there will never be available capacity for Article VII waters. If New Mexico is permitted under the Compact to build excess capacity—designating it as flood control or power production—in order to accommodate Article

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[4] Oklahoma's use of a "plain reading" argument is ironic in the light of its re-wording of the language of the Complaint and Article IV(b) of the Compact by omitting the "originating" language appearing in both documents. *See* Ok. Br. at 4; *compare id. with* Complaint at 4 (¶9) (April 16, 1987) (discussing Article IV(b)).

[5] The Report finds that Oklahoma's capacity interpretation would make Article VII meaningless as far as New Mexico is concerned. Report at 38.

VII waters, then the Compact does not limit reservoir capacity. Thus Oklahoma contradicts its own argument.

As the Report finds, not only Article VII but other provisions of the Compact contradict Oklahoma's position on the capacity issue, equating the conservation storage term with storage of water. Compact Arts. IV(c), VII, VIII; *see* Report at 37-39. The Report finds that "looking solely to the face of the Compact, nothing justifies treating the New Mexico 'conservation storage' limitation differently from the Texas stored water limitation, and other provisions of the Compact treat both limitations as ceilings on stored water, not reservoir capacity." *Id.* at 39. Article IV(c), in fact, is part of and supplemental to the Article IV(b) apportionment. It is fundamental that the different provisions of a contract or a statute must be construed together, as parts of a workable and harmonious whole. *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 837 (1988); *Avedon Corp. v. United States*, 15 Cl.Ct. 771, 776 (1988); *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 566 (9th Cir. 1988). The only harmonious reading of the Compact is that it applies to storage of water, not total reservoir capacity.

Oklahoma looks to the negotiating history of the Compact to bolster its claim that the Compact limits reservoir capacity. The main focus of the Oklahoma analysis is Article IV of the December 5, 1950 draft of the Compact, in which the limitations on New Mexico's storage of water in previous drafts of the Compact were replaced by a limitation on "storage capacity." There is no basis for Oklahoma's unsupported assertion that the phrase "storage capacity,"

as it appears in the December 5 draft, means the same thing as the capacity of reservoirs, rather than water storage volume. Moreover, as with the Compact itself, other provisions of the December 5 draft are in conflict with Oklahoma's understanding, and those provisions make clear references to New Mexico's storage of water. *See* N.M. Ex. 30, Ex. F at Arts. III and VII (December 5 draft provisions applying to New Mexico's impoundment of "more water than the amount set forth in Article IV" and each State's provision of "accurate records of the quantities of water stored in reservoirs pertinent to the administration of this Compact").

Oklahoma concedes that in all the early drafts of the Compact, New Mexico's limitation was on waters in storage, not on the physical size of reservoirs. Ok. Br. at 12. Oklahoma also concedes that at least part of the language on which it relies in the December 5 draft was deleted from the final Compact. *Id.* Thus the thrust of Oklahoma's negotiating history argument is that, although the negotiators consistently agreed that the limitation on New Mexico was in terms of waters in storage, they made a sudden radical change on the day before they signed the Compact, without discussion or explanation, the effect of which was to reduce New Mexico's storage rights significantly. Then, in the final Compact, they deleted some of the language which supposedly accomplished this change, but they still intended the deleted language to have effect. This simply is not plausible.

The more plausible understanding is that no negotiator at any point contemplated that total reservoir capacity in New Mexico would be limited, because such a limitation would be practically unworkable for

the reasons given above. Instead, the negotiators worked in the context of the Article II(d) phrase "that portion of the capacity of reservoirs," which appears in identical language in all drafts of the Compact. N.M. Ex. 30, Exs. A, B, C, F. Thus when the negotiators discussed "storage capacity" in the December 5, 1950 draft, they were not limiting the size of reservoirs, but limiting "that portion of" reservoirs which could be devoted to conservation storage. This understanding makes all Compact drafts consistent in regard to the capacity issue, giving every draft a uniform waters-in-storage meaning with respect to conservation storage. Therefore, Oklahoma's argument concerning its supposed "plain reading" of Articles II(d) and IV(b) is belied by the very history Oklahoma advances in support of its cause. Ok. Br. at 6.[6]

The Report correctly finds that the Compact applies its limitations to water in storage, not reservoir capacity. Oklahoma never explains why a reservoir capacity limit, which leads to absurd consequences, should have been chosen by the negotiators when, as Oklahoma admits, a much more feasible water-in-storage limitation would do just as well. *Id.* at 8. Oklahoma's position is incorrect and contradictory. The Report correctly rejected it.

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[6] Contrary to Oklahoma's argument, the Raymond Hill memorandum contradicts the capacity interpretation, because Hill was discussing conservation storage which is provided by allocation of storage in a "portion of reservoir capacity." Article II(d); *contrast id. with* Ok. Br. at 13-14.

II. Texas Is Incorrect, and Attempts to Prejudice New Mexico, in Arguing that the Record Is Sufficient for the Court to Decide the Desilting Pool Issue

A. Texas Is Incorrect that the Court Should Decide the Desilting Pool Issue on the Current Record, but if the Court Does Decide the Issue, New Mexico Should Prevail

Texas objects to the Report's recommended referral of the desilting pool question to the Commission, both on the merits of the issue and as a matter of procedure. Texas Brief at 2-8 (December 20, 1990) ("Tx. Br."). The desilting pool issue will be mooted if the Court decides in favor of New Mexico's exception on the "above Conchas" issue. If not mooted, the desilting pool issue should be referred to the Commission for further factual development, as the Report recommends. If the Court does not refer this issue to the Commission, the matter should be remanded to the Master for an evidentiary hearing. If the Court reaches the merits of the question, New Mexico should prevail.

The Report characterizes the desilting pool issue as "the kind of evolution of reservoir operating concepts which presents an issue of Compact interpretation appropriate for consideration and disposition by the Commission in the first instance." Report at 97. Rather than clearcut questions of Compact interpretation appropriate to this summary judgment proceeding, the desilting pool issue involves facts and engineering judgment. *See* N.M. Exs. 73, 75; Tr. at 28-30 (June 19, 1990). Until the Master's Draft Report, however, the parties had focused on Compact interpretation rather than questions of engineering. This was the reason the Special Master chose not to decide the desilting pool matter on cross-motions for

summary judgment, but to refer it to the Commission for further consideration and development of a record. *See* Report at 97-98. The Special Master correctly found that the matter needed further development. The Court should *a fortiori* decide likewise.

Texas has presented no argument—apart from an assertion that it will be harmed by delay in the disposition of this issue—as to why the procedure recommended by the Report should not be followed. Instead, Texas argues that the Court should reach out, despite the absence of an initial determination by a fact-finder with expertise in these matters, and decide the merits of the desilting pool issue in the plaintiffs' favor. This would deprive the Court of the benefit of further factual development on a fact-intensive, technical issue.

No purpose is served by preventing the development of a full record on this issue. Texas' claim that it is harmed by delay is not justified. Texas has not alleged, and will not suffer, irreparable harm. Texas has not needed the approximately 25,000 acre-feet of water in the Ute Reservoir desilting pool because of the hundreds of thousands of acre-feet of water available to it in Lake Meredith. *See* Report at 9. An incorrect decision against New Mexico on the basis of an inadequate record, however, would harm New Mexico.

Texas' attempt to avoid the development of a complete record on this issue underscores the fact that New Mexico is correct on the merits. The uncontradicted evidence in this case is that the use of a desilting pool at Ute Reservoir is a reasonable and necessary approach to sediment control, given the

characteristics of the reservoir and the needs of the water supply project planned from that reservoir. N.M. Ex. 75; Pls. Ex. 98g at 47 (Tr. of Twenty-Sixth Annual Meeting, Canadian River Commission, March 6, 1984).

The dead pool at Ute Reservoir, which is exempt from conservation storage under the Compact, can serve as a sediment control pool. Because one of the chief sediment-bearing tributaries to the Canadian River empties into Ute Reservoir a short distance upstream from Ute Dam, however, the dead pool at Ute is insufficient to provide adequate sediment control. A sediment control reservoir that is separate and upstream from the main reservoir is also an ordinary engineering technique which would be unquestionably permissible under the Compact. *See* Report at 96. There is no feasible site upstream for a sediment control reservoir separate from Ute Reservoir. Therefore, New Mexico has designated a portion of the reservoir above dead storage to provide sediment control. New Mexico's desilting pool is a reasonable engineering and economic means of sediment control within the meaning of Article II(d). *See* Tr. at 153-56 (Nov. 1, 1989).

Texas is also incorrect that New Mexico's designation of a desilting pool is premature. Texas wrongly suggests that "prospective customers have lost interest" in the Eastern New Mexico Water Supply Project, the municipal water supply plan for which the desilting pool is intended. Tx. Br. at 4, citing Report at 91. In further proceedings before the Commission or the Master, New Mexico can show that the option contract which the Report notes as having expired recently was re-contracted almost immediately. The

cities in this project cannot afford to lose interest in a future water supply. New Mexico cities are concerned about the exhaustion of the Ogalalla underground aquifer which serves the area, just as are their neighbors across the state boundary in Texas, who use the same aquifer. As the groundwater supply decreases, the need for surface water will become acute. Both states recognize the inevitability of this increasing need. *See* N.M. Ex. 73 at 6 (1990 Bureau of Reclamation report to Canadian River Commission discussing current and future need for municipal water supply in eastern New Mexico). Thus, the interest of the two states in the municipal use of the water is essentially equivalent.

The issue of need, therefore, does not concern the need for water from the Canadian River, but whether the fact that the delivery system for the Eastern New Mexico project is not yet under construction means that there is no need to store water now. Texas argues that New Mexico should release the water now and rely on the potential supply from erratic flood flows to supply municipal demands when the project is built.[7] Such a requirement would harm New Mexico through the accelerated encroachment of sediment into the space required for the desilting pool, to the detriment of the municipal water supply. In order to avoid the unnecessary risk of that harm, a desilting pool is needed now, and the establishment of that pool is not premature.

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[7] Although the Bureau has estimated that completion of the Eastern New Mexico project will take seven years, portions of the project to nearby communities could be completed much sooner. *Compare* Pls. Ex. 142 *with* N.M. Ex. 73.

B. Texas' Argument on the Desilting Pool Issue Contains Misleading Factual Assertions that Prejudice New Mexico

Texas also makes misleading factual assertions which, if not corrected, will prejudice New Mexico. For example, Texas declares that "[t]he controversy over New Mexico's claimed exemption of the water in [the Ute Reservoir] desilting pool began with the commencement of the enlargement of Ute Reservoir in 1982." Tx. Br. at 5. Texas then describes the discussions that went on between 1982 and 1987, and completes the paragraph with the assertion that "[t]hroughout all of this controversy, New Mexico has treated the pool as exempt and withheld the water from the downstream states." *Id.* This assertion is seriously misleading for two reasons.

First, although New Mexico has always believed, and continues to believe, that the desilting pool is permissible under the Compact, New Mexico's storage of water in the pool could not have violated the Compact until 1987, when water spilling from Conchas Dam filled the available storage capacity in Ute Reservoir. Before 1987, New Mexico had never attained 200,000 acre-feet of water storage in the basin below Conchas Dam, and thus could not possibly have violated Article IV(b), either through the claim of a desilting pool or by any other means.[8] Thus, to the

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[8] New Mexico was holding water in Ute Reservoir pursuant to a contract with the State Game Commission prior to 1982, but the total amount of water in storage was less than 109,000 acre-feet. Report at 16. In 1984, when the enlargement of Ute was completed and the enlarged reservoir began to fill, the operating criteria which established the desilting pool were promulgated. The total amount of water in storage at Ute Reservoir did not exceed 200,000 acre-feet until the spills of floodwater

extent that Texas asserts that New Mexico had an obligation to release desilting pool water prior to 1987, Texas does so misleadingly.

Second, the desilting pool issue may be mooted by the Court's decision on New Mexico's exceptions regarding the above-Conchas issue. If New Mexico prevails in its exceptions, no water originating above Conchas Dam will be chargeable to New Mexico under Article IV(b). In that event, the total amount of Article IV(b) water will be so far below the 200,000 acre-foot limitation that the water in the desilting pool cannot be in violation of the Compact. *See* New Mexico's Brief in Opposition to the Oklahoma and Texas Motion for Leave to File Complaint, Apps. A and B (June 25, 1987); New Mexico's Answer at 9 (Aff. Def. 2) (December 4, 1987).

Texas wrongly asserts that New Mexico claims exemption for the desilting pool "because" it is actually being maintained as a minimum recreation pool under the State Game Commission contract, so that New Mexico will be able to receive recreation benefits as well as 200,000 acre-feet of conservation storage. Tx. Br. at 5. This characterization of New Mexico's intent is without foundation. The citation in Texas' brief to the Report supports only the existence of the contract. *See id.*, citing Report at 90. There is no basis for the plaintiff's prejudicial accusation that the desilting pool is a subterfuge to protect the recreation pool established under that contract. Recreation benefits from Ute Reservoir are incidental to the mu-

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from Conchas Dam in the spring of 1987 occurred, one of the events precipitating the "above Conchas" issue of this lawsuit under Article IV(a) of the Compact. *See* Agreed Material Facts F6, F7, F10.

nicipal and industrial purposes which were the reasons Ute Dam and Reservoir was constructed. *See* Report at 92-93, 102, 105, 106-07; Pls. Ex. 51 (1962 approval of 1960 water rights application for Ute Reservoir).

Moreover, the reason given for the supposed subterfuge—the assertion that recreation benefits from the storage of water at Ute Reservoir have been "very lucrative" for New Mexico—is false. Tx. Br. at 5, citing Pls. Exs. 121-125. The two economic analyses of recreation benefits from Ute Reservoir that were submitted to the State Engineer prior to the decision to enlarge Ute Dam are Plaintiffs' Exhibits 124 and 125. These exhibits, on which Texas relies to demonstrate the lucrative benefits from Ute Reservoir, are economic projections rather than actual data and, in any event, do not support the proposition that the recreation aspects of the project are profitable. The first analysis showed that only about $391,000 annually in increased recreation revenues might be expected as a result of the total enlargement of Ute Reservoir from 109,000 acre-feet to 272,800 acre-feet. Pls. Ex. 124 at 5. Annual project costs of $843,000 were more than double the project benefits, resulting in a cost-benefit ratio of 0.46, a negative result. *Id.* at 11. The second analysis increased the estimated annual recreation benefits to be expected from the Ute Dam enlargement to a total of $547,500. Pls. Ex. 125 at 4. With costs remaining the same, the cost benefit ratio changed to a still-negative 0.65. *Id.* Both of these analyses were asserting recreation benefits attributable to the entire expansion of the reservoir. The benefits attributable only to the desilting pool are considerably less. Thus, the plaintiffs are incorrect to suggest that recreation benefits flowing from the

desilting pool were so lucrative to New Mexico that it was worth New Mexico's while to invent a spurious legal theory to protect those benefits by claiming that the water was needed for sediment control purposes. As shown above, the water is in fact needed for sediment control purposes.

Finally, Texas claims that the amount of water impounded in Ute Reservoir, and the extent of New Mexico's violation, has been "considerably greater" than the Report's finding as of June 23, 1988. Tx. Br. at 1. The agreed facts cited by Texas do not include deductions for exempt water storage categories such as the desilting pool, sediment in the small reservoirs below Conchas Dam, or sediment deposited in Ute since the 1983 survey. Nor does the assertion made by Texas take into account the significant releases from Ute Reservoir made by New Mexico for operational purposes since 1987, releases of which plaintiffs are aware but which are not yet of record, because the current phase of the litigation does not concern damages and remedies. If necessary in the future, New Mexico will show that these post-1987 releases have reduced or eliminated any claimed damages to plaintiffs. Until that time, Texas' assertions should be disregarded.

Texas' claim as to the extent of New Mexico's supposed violation demonstrates that Texas agrees with New Mexico that the table set out in the Report at 111 does not provide an adequate basis for determining New Mexico's violation, if any, of the Compact. Tx. Br. at 1. Texas argues that New Mexico violated the Compact to a greater extent than that shown in the Report. New Mexico believes it can show a lesser violation or none. *See* New Mexico Brief at

42-44 (December 20, 1990) ("N.M. Br."). The parties agree, however, that the figures shown in the Report do not provide a basis for Paragraph 9 of the Recommended Decree, which purports to quantify a violation. Therefore, Paragraph 9 should be deleted, even if the Report's recommendations on other issues are accepted.

III. The Parties Agree Concerning Certain Aspects of the Report's Procedural Suggestions. Texas is Incorrect, However, in Failing to Acknowledge the Benefit of Primary Jurisdiction for Technical Issues. Texas' Request for Sanctions Against New Mexico is Wholly Baseless

The plaintiffs and New Mexico apparently agree concerning the Report's suggestion that certification of good faith negotiation should be a prerequisite to the invocation of original jurisdiction. All parties argue that this suggested procedure is potentially burdensome and counterproductive. The parties also agree that, in the event that a compact commission hears an issue in the first instance, the Court should undertake a *de novo* review of the issues, rather than being limited to the record of proceedings before the Commission.

New Mexico disagrees, however, with the Texas contention that the doctrine of primary jurisdiction never should be employed in compact cases. As New Mexico has discussed, the exercise of primary jurisdiction in the Commission may be very helpful to the Court where the issues call for technical expertise. N.M. Br. at 48-50. Thus, New Mexico agrees with the Report's recommendation that the technical issues concerning the desilting pool should be referred to the Commission for decision in the first instance.

Texas asserts that referring the desilting pool issue to the Commission for consideration and fact-finding would unfairly delay vindication of Texas' claimed rights. Tx. Br. at 7, citing a Special Master's decision in *Kansas v. Colorado*, No. 105, Original (filed March 3, 1986). The principle reason for the decision cited by Texas appears to have been Colorado's repeated use of its veto to frustrate Arkansas River Compact Administration fact-finding. The Special Master in that case expressly found that Colorado had acted in good faith in doing so. *See* Tx. Br., App. B at B-10. New Mexico has never attempted to frustrate Commission fact-finding, and there is no basis for assuming that it would do so. In fact, New Mexico believes that the Commission is "precisely the meeting place where intentions can be communicated and negotiations entered into." Tr. at 232 (June 19, 1990).

In the course of the Texas discussion of good faith, Texas requests that the Court levy sanctions against New Mexico. Texas provides neither argument nor citation to support this request. The only possible basis for such an award is the Report's remark that New Mexico "appears to have been a reluctant participant" in Compact discussions. Report at 37. The Report does not recommend sanctions, and its comment that New Mexico appeared to be reluctant at one point is an obviously inadequate basis for sanctions. Reluctance is not the same as bad faith.

Moreover, the Report's suggestion that New Mexico was reluctant to discuss the issues is inaccurate. *See* Pls. Ex. 98g at 36-56; *see generally* Pls. Ex. 98e (Tr. of meeting of Texas, Oklahoma, and New Mexico representatives, September 29, 1982). New Mexico has not delayed appropriate Commission action. It was

Oklahoma which first asserted that further discussions before the Commission would not be helpful. *See* Pls. Ex. 98g at 40-41. The primary Commission action vetoed by New Mexico was a resolution setting forth Texas' and Oklahoma's ultimate legal position on the enlargement of Ute Dam and other subsidiary issues, with which New Mexico disagreed. *See* Report at 22. It hardly amounts to bad faith, or unreasonableness, to vote against Commission expression of a legal position that New Mexico believed to be incorrect. The Report agrees with New Mexico's assessment that the plaintiffs were wrong on the capacity issue. Therefore, sanctions are inappropriate.

The matter of sanctions was not raised by the pleadings and is not germane to the issues. There is no basis for sanctioning New Mexico or any other party. The eleventh-hour claim made by Texas should therefore be rejected by the Court.

CONCLUSION

For all the above reasons, the Court should reject the separate exceptions made by plaintiffs to the Report, while sustaining New Mexico's exceptions to the Report. The Court should enter New Mexico's Proposed Decree. N.M. Br., App. B. at 9a-11a. If further consideration of the desilting pool issue is not mooted by the Court's decision on the "above Conchas" issue, the Court should adopt Paragraph 10 of New Mexico's Proposed Decree. *See id.* at 10a-11a. No sanctions or costs of any kind should be assessed.

Respectfully submitted,

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